Nos. 20-512, 20-520

IN THE

Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
Petitioner,

v.

SHAWNE ALSTON, ET AL.,
Respondents.

AMERICAN ATHLETIC CONFERENCE, ET AL.,
Petitioners,

v.

SHAWNE ALSTON, ET AL.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

Brief of *Amicus Curiae* The Committee to Support the Antitrust Laws Supporting Respondents and Affirmance

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Interest of the Amici Curiae.

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972). The Committee to Support the Antitrust Laws (COSAL) is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct through the enactment, preservation, and enforcement of a strong body of antitrust laws. *See* https://cosal.org (last visited Mar. 8, 2021). COSAL is governed by its Board of Directors, which elects officers, who supervise and control its day-to-day operations.[1]

The Supreme Court has long recognized the key role private litigants play in enforcing federal antitrust laws. *See, e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("Without doubt, the private cause of action plays a central role in enforcing this regime."); *California v. Am. Stores Co.*, 495 U.S. 271, 284 (1990) (describing private enforcement as "an integral part of the congressional plan for protecting competition"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977)

[1] Pursuant to Rule 37.6, COSAL affirms that no counsel for a party authored this brief in whole or in part, and no person other than COSAL and its counsel made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief. In addition, no COSAL member whose firm is counsel for a party had any involvement in the organization's decision to file this amicus brief.

(recognizing "the longstanding policy of encouraging vigorous private enforcement of the antitrust laws"). The federal government cannot prosecute every violation of federal antitrust laws. Nor has the federal government traditionally seen its role as compensative of the victims of antitrust violations. Private enforcement fills these significant gaps, which is even more true in the case of rule of reason violations, where federal regulators have traditionally been less active.

The positions advanced by the NCAA and various *amici* could curtail private enforcement by granting new antitrust immunities to joint venture activity in ways foreclosed by this Court's precedent. The fact intensive rule of reason framework that the Sherman Act demands has been applied successfully to the conduct of the NCAA in a number of cases without problem. Despite the NCAA's consistent protestations that the sky would fall because of prior decisions finding that the NCAA's conduct violated the Sherman Act, those decisions have not unraveled the fabric of college athletics. The markets in question are more vibrant for both consumer and athlete. But if the NCAA succeeds here in rewriting the antitrust laws to immunize its conduct, the potential fallout could reach beyond the student athletics markets at issue and have a chilling effect on private enforcement whenever a joint venture (or a putative joint venture) is implicated. COSAL thus has a substantial interest in the resolution of this case.

Summary of the Argument.

The NCAA has had multiple opportunities to present evidence that its naked restraints of trade on compensation to college athletes are reasonably

necessary to maintain "amateurism"—the NCAA's conjured up term for what it claims differentiates college sports from professional sports. Having repeatedly failed to make that showing, the NCAA now argues that, as a professed joint venture, it should receive "abbreviated deferential review" rather than full rule of reason scrutiny. The NCAA argues that restraints "reasonably related" to defining "a joint venture's distinct product are procompetitive because they enable a product to exist that would otherwise be unavailable, and hence should be upheld against antitrust challenge without detailed rule-of-reason analysis." NCAA Br. at 24–25.[2] This request could grant sweeping antitrust immunity for joint venture conduct that is not supported by any precedent. It is nothing more than a last-ditch effort by the NCAA to rewrite the antitrust laws to afford it immunity for any restraint of trade that it can tangentially relate to its ever-evolving definition of amateurism.

The NCAA's request goes too far. As an initial matter, the NCAA is itself not even a joint venture. The NCAA did not even attempt to establish this factual predicate in the district court and so, unsurprisingly, neither the district's nor circuit court's lengthy opinions even mention that term. There is no reason for this Court to weigh in on joint venture activity writ large, particularly where this Court and lower courts around the country have faithfully and correctly applied the rule of reason to joint ventures for decades. This standard establishes a flexible framework for review of joint venture activity that allows for the continuation of

[2] Citations to "NCAA Br." are to the NCAA's Opening Brief in Case No. 20-512 (filed Feb. 1, 2021).

procompetitive joint ventures while striking down those that harm competition. In fact, the proper application of the rule of reason to the NCAA in the *Alston* case, as well as in the predecessor *O'Bannon* litigation, illustrates exactly why a routine rule of reason inquiry—and not the truncated and deferential "review" concocted by the NCAA—is the appropriate mode of analysis here. Put simply, since the NCAA cannot win on the field, it now wants to change the rules of play.

The NCAA's request to rewrite the Sherman Act to immunize its anticompetitive conduct is a job for Congress, not the courts. Moreover, allowing the NCAA (or any *actual* joint venture) to evade full rule of reason analysis would have the likely effect of blessing anticompetitive activity well beyond the college athletics markets at issue in this case. This Court should affirm.

Argument.

I. Relevant Background.

The NCAA is the main body that coordinates and regulates collegiate level athletics; it is comprised of 1,098 member colleges and universities, which are organized into 102 athletic conferences and 3 Divisions. NCAA, *What is the NCAA?*, https://tinyurl.com/1jd8xmlk (last visited Mar. 8, 2021). The NCAA has implemented regulations which not only dictate the contours of athletic competition among member schools, but also severely curtail the compensation that college athletes may receive. Pet. App. at 69a.[3] But this is not because the athletes are

[3] Citations to "Pet. App." are to the Appendix to the NCAA's Petition for Writ of Certiorari in Case No. 20-512 (filed

not generating sufficient revenues. Each year, "[t]he NCAA [itself] generates approximately one billion dollars," a number which is only a fraction of the billions of dollars of revenue that are generated for their universities, athletic conferences, and related institutions. *Id.* at 68a. Revenues continue to rise sharply as the NCAA and its member schools engage in more commercial activity, including broadcast contracts, corporate sponsorships, ticket sales, apparel deals, and merchandise sales.[4]

In 2014, a group of college athletes brought suit against the NCAA, challenging rules that: "(1) cap at the cost of attendance grants-in-aid they may receive for their athletic services, and (2) limit the additional compensation and benefits that they can receive in addition to a grant-in-aid athletic scholarship, which have a monetary value above the cost of attendance." *Id.* at 127a. The college athletes claimed that in the absence of these rules, they would receive more compensation in exchange for their athletic services. *Ibid.*

In order to successfully establish a claim under Section 1 of the Sherman Act, the college athletes were required to show "1) that there was a contract, combination, or conspiracy; 2) that the agreement

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Oct. 15, 2020), which contains the Ninth Circuit Court of Appeals opinion (pp. 1a-64a), the District Court's Findings of Fact and Conclusions of Law (pp. 65a- 165a), and the District Court's Permanent Injunction (pp. 167a-170a).

[4] U.S. Senator Chris Murphy, *Madness, Inc. How everyone is getting rich off college sports – except the players*, Mar. 28, 2019, at 3, https://www.murphy.senate.gov/newsroom/press-releases/murphy-releases-madness-inc-report-calls-on-ncaa-to-compensate-student-athletes (last visited Mar. 8, 2021).

unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and 3) that the restraint affected interstate commerce." *Id.* at 127 (citation omitted). The district court determined that the rule of reason standard applied to the challenged conduct, noting that although "horizontal price-fixing among competitors is usually a per-se violation of anti-trust law, because a certain degree of cooperation is necessary to market athletics competition," the rule of reason standard was appropriate in this case. *Id.* at 75a (cleaned up); *O'Bannon v. NCAA*, 802 F.3d 1049, 1069 (9th Cir. 2015).

The rule of reason is a rigorous, burden-shifting analysis traditionally involving multiple steps:

> Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means.

Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018). No one factor is necessarily determinative. *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 42 (2d Cir. 2018) (internal citations omitted).

Consistent with this Court's precedent, the district court properly applied this multi-step framework:

> (1) student-athletes bear the initial burden of showing that the restraint produces significant anticompetitive effects within a relevant market; (2) if they carry that burden, the NCAA must come forward with evidence of the restraint's procompetitive effects; and (3) student-athletes must then show that any legitimate objectives can be achieved in a substantially less restrictive manner.

Pet. App. at 33a (cleaned up); *see also O'Bannon*, 802 F. 3d at 1070.

At the first step of the rule of reason analysis, the district court granted summary judgment in favor of the college athletes, finding there were "significant anticompetitive effects in the relevant market." Pet. App. at 17a. In making its finding, the court considered the full factual record presented by both the NCAA and the student-athlete plaintiffs. That factual record showed, among other things, "that schools, as buyers of athletic services, exercise monopsony power to artificially cap compensation at a level that is not commensurate with student-athletes' value and that but for the challenged restraints, schools would offer recruits compensation that more closely correlates with their talent." *Ibid.* (cleaned up, internal citations omitted).[5] The court

[5] The district court cited to testimony that the Power Five (the largest conferences in Division I) were urging the

emphasized that the value that college athletes create is "reflected in the extraordinary revenues that the [NCAA] derive[s] from these sports." *Id.* at 82a.

Turning to step two of the rule of reason analysis, the court examined the factual record presented by the NCAA in support of its procompetitive justifications that the challenged restrictions were tied to amateurism, which the NCAA argued promoted consumer interest as "consumers value amateurism." *Id.* at 83a. Carefully analyzing the factual record, the district court acknowledged the justification as a means to limit non-education related cash compensation to college athletes, but held that the NCAA had not made a factual showing that amateurism justified limiting non-cash compensation for education-related benefits.

The court found "(i) the challenged rules do not follow any coherent definition of amateurism or even pay, and (ii) these payments have not diminished demand for college sports, which remains exceedingly popular and revenue-producing." *Id.* at 19a (cleaned up). In particular, the court found that in 2015, student compensation rules were adjusted to allow for additional college athlete compensation and consumer demand was not negatively impacted. *Id.* at 95a. The court emphasized that limits on "non-cash education-related benefits," such as post-eligibility graduate scholarships or tutoring "could not be confused with a professional athlete's salary" but

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NCAA to ease compensation regulations as schools were seemingly allowed to pay for anything, "including palatial athletic facilities and seven-figure coaches' salaries," except for financial support for college athletes; this concern highlighted the court's view that college athletes would receive higher compensation if not for the NCAA's restrictions. Pet. App. at 17a.

rather would "emphasize that the recipients are students." *Id.* at 109a. The court concluded that the NCAA did not show that the challenged rules were procompetitive. *Id.* at 115a.

At the third step of the rule of reason analysis, the college athletes proposed three potential alternatives to the challenged restraint as "less restrictive but virtually as effective in preventing 'demand-reducing unlimited compensation indistinguishable from that observed in professional sports.'" *Id.* at 22a. Out of the proposed alternatives, the court rejected the two alternatives that offered the NCAA the least flexibility, and accepted the one that provided the NCAA with the most latitude that the Sherman Act could tolerate:

> (1) allowing the NCAA to continue to limit grants-in-aid at not less than the Cost of Attendance; (2) allowing the NCAA to continue to limit compensation and benefits unrelated to education; and (3) enjoining NCAA limits on most compensation and benefits that are related to education, but allowing it to limit education-related academic or graduation awards and incentives, as long as the limits are not lower than its limits on athletic performance awards now or in the future.

Id. at 118a (cleaned up). This least restrictive alternative was then implemented by the court via permanent injunction. *Id.* at 167a.

The NCAA appealed the lower court's decision. The circuit court found that the district court

"properly applied the [r]ule of [r]eason in determining that the enjoined rules are unlawful restraints of trade under section 1 of the Sherman Act, 15 U.S.C. § 1." *Id.* at 7a. Under review, the circuit court held that the district court properly found in favor of the college athletes at the first step of the rule of reason analysis, affirming the district court's finding that the NCAA's rules have "significant anticompetitive effects in the relevant market for student-athletes' labor." *Id.* at 34a (cleaned up).

Turning to the second step of the rule of reason analysis, the circuit court noted that the NCAA advanced a single procompetitive justification: that "the challenged rules preserve amateurism, which, in turn, widens consumer choice by maintaining a distinction between college and professional sports." *Ibid.* (cleaned up). The circuit court also acknowledged that the district court credited the "importance to consumer demand of maintaining a distinction between college and professional sports," but ultimately concluded that "only *some* of the challenged rules serve a procompetitive purpose" and that those "restricting non-cash education-related benefits do nothing to foster or preserve demand because the value of such benefits, like a scholarship for post-eligibility graduate school tuition, is inherently limited to its actual value, and could not be confused with a professional athlete's salary." *Id.* at 37a (cleaned up, emphasis in original). The circuit court held that the district court "reasonably relied on demand analyses, survey evidence, and NCAA testimony indicating that caps on non-cash, education-related benefits have no demand-preserving effect and, therefore, lack a procompetitive justification." *Id.* at 36a.

At the rule of reason's third step, the circuit court affirmed the district court's acceptance of a less restrictive alternative. *Ibid.* The circuit court reasonably concluded that "uncapping certain education-related benefits would preserve consumer demand for college athletics just as well as the challenged rules" as they are "easily distinguishable from professional salaries" and "their value is inherently limited to their actual costs and they can be provided in kind, not in cash." *Id.* at 41a–42a.

At no point during either the district court or the circuit court's thorough analyses of the record under the multi-pronged, fact-intensive rule of reason framework was the NCAA characterized as a joint venture. Nor is there anything in the record demonstrating that the NCAA ever seriously attempted to establish the factual predicates for such a conclusion.

II. The NCAA Is Not a Joint Venture.

Much of the NCAA's and its *amici*'s arguments assume and depend on the NCAA's self-characterization as a joint venture. *See, e.g.*, NCAA Br. at 17 ("This Court applied these principles to the NCAA in *Board of Regents*, explaining that the NCAA (a joint venture) acts procompetitively by offering the 'product' of college sports that is different from professional sports because the participants are not only students but also amateurs, i.e., not paid to play."). But nothing in the record before this Court supports that notion. Neither the district court, with the benefit of a weeks-long trial and extensive factual record, nor the circuit court, ever mention the term "joint venture" in their decisions. This Court, despite the NCAA's misleading characterization of the *Board*

of Regents decision, has never found the NCAA to be a joint venture—indeed, while the NCAA argued in *Board of Regents* that it was operating as a procompetitive joint venture, this Court explicitly rejected that argument. *NCAA v. Board of Regents of Univ. of Oklahoma*, 468 U.S. 85, 86 (1984) ("The record does not support the NCAA's proffered justification for its television plan that it constitutes a cooperative 'joint venture' which assists in the marketing of broadcast rights and hence is procompetitive.).

In its brief, the NCAA does not even attempt to make a predicate showing of its status as a joint venture. It simply assumes that this Court will accept its *ipse dixit* assertion. But an examination of the NCAA's structure refutes that characterization.

Each of the NCAA's thousands of member schools is an independent entity, with its own president, athletic director, coaches, and recruiting staff, and each with its own incentive to maximize revenues. The ability to generate revenues is substantial; by the NCAA's own numbers, in 2019, athletics departments generated $10.6 billion in revenue (in addition to another $8.3 billion provided by institutional sources). NCAA, *Finances of Intercollegiate Athletics*, https://tinyurl.com/yhfduhcl (last visited Mar. 8, 2021).

To maintain successful athletic programs and achieve greater and greater athletic revenues, NCAA member schools engage as horizontal competitors with one another to attract elite college athletes. This competition is vigorous, as the best college athletes provide the best opportunity for the member schools to maximize their own revenues. In their competitive

quest to attract the best student athletes, schools expend sizable sums of money. *Board of Regents*, 468 U.S. at 99; *Agnew v. NCAA*, 683 F.3d 328, 340 (7th Cir. 2012). This vigorous competition among its member institutions illustrates why the NCAA is not a joint venture. *Compare Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (Texaco and Shell did not compete with one another in the relevant market and so were not involved in a horizontal price-fixing agreement). Tellingly, though, the massive revenues derived from this fierce competition for student athletes' labor are not won by the students themselves, but predominately diverted into over-the-top amenity-filled training facilities[6] and coaching salaries that

[6] Collegiate athletics have engaged in a competitive building boom for over-the-top athletic facilities, which are used to recruit college athletes. In February 2017, Clemson University finished a $55 million dollar complex for its football players which included, amongst other things, a miniature golf course, sand volleyball courts, laser tag, a movie theatre, bowling lanes, a barber shop, a slide to get from the second floor of the facility to the practice field, a covered full-size outdoor basketball court, a shoeshine area, and a nap room. *See* Athnet, *Build It and They Will Come. The Value of Athletic Facilities In Attracting Top Athletes*, https://tinyurl.com/ytce8qj5 (last visited Mar. 8, 2021); *see also* Clemsen Tigers, *Allen N. Reeves Football Complex*, https://tinyurl.com/y734mxvn (last visited Mar. 8, 2021); Cork Gaines, *Clemson's $55 Million Football Complex Shows How Swanky College Football Facilities Have Become for the Top Programs*, BUSINESS INSIDER, Jan. 8, 2019, https://tinyurl.com/ypr9fvsz. Likewise, University of Oregon spent a reported $68 million dollars on a "Football Performance Center" which included a barber shop, a television wall with sixty-four 55-inch screens, a player lounge with pool tables and gaming stations, and a dining room that reminds players to "eat your enemies." *See* Patrick Rishe, *Thank You, Phil Knight: Oregon's New $68 Million Recruiting Tool*, FORBES, AUG. 3, 2013, https://tinyurl.com/3qu8ly5u; *see also* Kenny Dorset, *Oregon*

rival or exceed those of professional coaches. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 990 F. Supp. 2d 996, 1004 (N.D. Cal. 2013); *see also O'Bannon*, 802 F.3d at 1056, 1070. In 2019, the University of Georgia became the first school to surpass $3 million dollars in annual college football recruiting expenses alone—an increase from the $2.62 million dollars expended by the same program in 2018. This elevated spending on recruiting is not an isolated occurrence—38 of the 52 Power Five schools also surpassed their recruiting expenditures in 2019, on average spending $103,478 more than the previous year's recruiting cycle.[7]

Further, as the district court found, each sport in which NCAA member institutions compete is a separate labor market, such that men's FBS football, men's Division I basketball, and women's Division I basketball are all separate national labor markets. It follows that there are dozens of different labor markets in which the NCAA and its member institutions operate. Thus, the NCAA is not an "economically integrated joint venture," as in *Dagher*; it is composed of hundreds of financially independent academic institutions, dispersed around the country, with different athletic offerings, in different NCAA divisions, and with differing economic motivations. Those academic institutions do not pool capital, share the risks of loss, or demonstrate any other characteristics of a traditional joint venture. *See*

Football Shows Off Amazing New Football Performance Center, BLEACHER REPORT, July 31, 2013, https://tinyurl.com/3tyfphg8.

[7] Andy Wittry, *An Analysis of College Football Recruiting Costs*, ATHLETIC DIRECTOR U, https://www.athleticdirectoru.com/articles/an-analysis-of-football-recruiting-costs.

Arizona v. Maricopa Cnty. Med. Soc., 457 U.S. 332, 356 (1982).

Given the NCAA's member institutions' status as active horizontal competitors, operating in dozens of disparate labor markets and with little to no economic integration, the NCAA cannot and should not be characterized as a joint venture under this Court's precedents. As such, this case has no relevance to joint ventures more broadly.

III. The Rule of Reason Is Well-Suited for Analyzing Joint Venture Activity.

Putting aside the fact that the NCAA is not a joint venture, the NCAA has argued that a joint venture's restraint of trade, if characterized as reasonably necessary to defining the product offered, should not be subject to rule of reason analysis. NCAA Br. at 17. Instead, defying decades of precedent to the contrary, including this Court's decision in *Board of Regents*, the NCAA argues for a new mode of analysis offering it wide deference to restrain competition as it sees fit. *Ibid.* But the rule of reason, which has been the default analysis under the Sherman Act for a hundred years, is the appropriate method for analyzing joint venture conduct, providing sufficient flexibility for the task. This is all the more true when the NCAA's proposed mode of analysis (which is really a request for antitrust immunity) amounts to dismissal on the pleadings whenever a joint venture contends—without *actually proving*—that its restraint of trade is reasonably necessary to provide a product or service.

Joint ventures are business arrangements in which "two or more firms agree to cooperate in producing some input that they would otherwise have

produced individually, acquired on the market, or perhaps would have done without." Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2100a (5th ed. 2020). Joint ventures "hold the promise of increasing a firm's efficiency and enabling it to compete more effectively." *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 768 (1984). But joint ventures also amount to concerted activity that is inherently fraught with anticompetitive risk; joint ventures "deprive[] the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id.* at 768–69. Joint ventures thus lie at the intersection of what Congress sought to regulate in the Sherman Act and they are not immune from antitrust scrutiny. *Id.* at 775. This Court "has repeatedly found" violations of Section 1 of the Sherman Act where a "legally single entity" like the NCAA allowed for restraints of trade among "a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010); *Board of Regents*, 468 U.S. at 113.

A traditional rule of reason analysis is the appropriate approach for analyzing such complex and real-world business arrangements to determine whether a particular joint venture has unreasonably combined "independent centers of decisionmaking." *Am. Needle*, 560 U.S. at 196; *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) ("In short, to protect the efficiency-enhancing potential of joint ventures and cooperatives, the rule of reason is the favored method of analysis for these ventures, preventing courts from intervening before a full market analysis is completed.") (Sotomayer, J., concurring). At its heart,

the rule of reason is an inquiry into "competitive reality" and "a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Am. Needle*, 560 U.S. at 191, 196. "The rule of reason requires courts to conduct a fact-specific assessment of 'market power and market structure . . . to assess the [restraint]'s actual effect' on competition." *Am. Express.*, 138 S. Ct. at 2284 (quoting *Copperweld*, 467 U.S. at 768). "The ultimate goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Id.* at 2284 (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 886 (2007)) (cleaned up).

Over the last forty years, joint ventures have been repeatedly and successfully analyzed under a traditional rule of reason analysis, which involves "an inquiry into market power and market structure designed to assess the combination's actual effect." *Copperweld*, 467 U.S. at 768. The rule of reason is a versatile tool that provides courts with a large degree of flexibility. *Am. Needle*, 560 U.S. at 203. Its burden-shifting structure allows courts to, where appropriate, deeply explore "all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Leegin*, 551 U.S. at 885 (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977)). The rule of reason also allows courts to account for market power and market structure; the nature, history, and impact of the alleged restraint; and other specific information regarding the alleged restraint and the business environment in which it occurs in order to "assess the combination's actual

effect." *Leegin*, 552 U.S. at 886; *Copperweld*, 467 U.S. at 768.

This Court has described the reason why a traditional rule of reason is the appropriate manner to analyze joint ventures: it places substance over form. *Am. Needle*, 560 U.S. at 195 ("substance, not form, should determine whether an entity is capable of conspiring under § 1") (quoting *Copperweld*, 467 U.S. at 773)) (cleaned up); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979). The traditional rule of reason analysis shields procompetitive joint ventures, and reveals unlawful horizontal restraints of trade, for instance where the facts show conduct to "evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products." *Salvino*, 542 F.3d at 335.

The breadth of facially suspicious joint venture restraints that courts have analyzed for potential anticompetitive effects under the traditional rule of reason analysis demonstrates its practicality and utility. To allow for this substance over form inquiry, the Court has rejected *per se* treatment for many joint ventures. *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284 (1985). But in the same way that a *per se* analysis for restraints of trade imposed by joint ventures could chill procompetitive conduct, the NCAA's proposed replacement for the rule of reason (which effectively presumes legality without any inquiry into market realities) would harm competition. The NCAA's proposed framework would inoculate certain market actors from any inquiry into the substance of their restraints of trade—predicated almost entirely on their chosen organizational form.

The utility of the traditional rule of reason analysis is confirmed by the recognition that the test is not outcome-determinative. Rather, the rule of reason analysis enables courts to neutrally examine the details of a particular joint venture to achieve an appropriate result. This Court's application of the rule of reason to joint ventures has reached results finding no violation of the Sherman Act, *Broadcast Music*, 441 U.S. at 23–25; *Dagher*, 547 U.S. at 5, as well as violations of the Sherman Act, *Am. Needle*, 560 U.S. at 203–04.

The same goes for circuit court opinions. *See, e.g.*, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (upholding van line's "group boycott" despite anticompetitive effects where that van line lacked market power, the restrictions were ancillary, and the joint venture promoted efficacy by preventing free riding); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958 (10th Cir. 1994) (upholding Visa USA bylaw excluding from membership competing Sears Discover Card consortium where restraint did not "alter the character of the general purpose credit card market or change any present pattern of distribution" and there was no evidence of consumer harm); *Polygram Holding v. F.T.C.*, 416 F.3d 29 (D.C. Cir. 2005) (combination of two record companies to refrain from advertising or discounting competing Three Tenor albums near in time to release of a third, jointly-backed album, properly halted by FTC where record companies failed to identify sufficient competitive justifications).

Rather than allowing courts to apply this flexible analysis to joint ventures, which are on their face combinations with competitive consequences, the

NCAA seeks "abbreviated deferential review" that would preclude a fact-based analysis, essentially providing any joint venture immunity where the restraint is—according to the joint venture participants—necessary to create the joint venture's product or service. NCAA Br. at 21. But the very *purpose* of the rule of reason is to determine *on the facts* whether the challenged restraint is actually necessary and reasonably tailored to the procompetitive benefits provided. *Broadcast Music*, 441 U.S. at 23. To make that assessment based on legal formalities and the joint venture's self-interested characterization, without undertaking any factual analysis into market realities, would go against decades of jurisprudence and could result in sweeping new antitrust immunities.

IV. The Outcomes of the *Alston* and *O'Bannon* Cases Provide Real-World Demonstrations of the Necessity of Traditional Rule of Reason Analysis.

Fortunately, this Court has real world evidence of how the NCAA's proposed deferential standard of review would result in anticompetitive conduct escaping antitrust liability. The NCAA's rules on compensation to college athletes, which constitute a naked restraint of trade among horizontal competitors, have now been subjected to two trials, in both *O'Bannon* and *Alston*. In *O'Bannon*, the court examined the NCAA's restraints as to compensation for college athletes' name, image, and likeness rights. There, the district court heard from 23 witnesses, reviewed 287 admitted trial exhibits, and received economic evidence concerning the alleged procompetitive aspects of the NCAA's restraint as well as the anticompetitive impact. Weighing all of

this evidence in an exhaustive 99-page opinion, and applying the rule of reason's burden-shifting framework to the evidence provided by both sides, the district court accepted in part the NCAA's proffered procompetitive justifications for the challenged restraint, but nonetheless found that Plaintiffs' proposed less restrictive alternative of allowing member schools to offer cost of attendance stipends from revenues earned through exploitation of college athletes' name, image, and likeness rights "would limit the anticompetitive effects of the NCAA's current restraint without impeding the NCAA's efforts to achieve its stated purpose." *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 982 (N.D. Cal. 2014). The court's decision was grounded in testimony from the NCAA's own witnesses. *Ibid.*

The circuit court upheld that portion of the district court's opinion. *O'Bannon*, 802 F.3d at 1074 (holding district court did not clearly err in finding that allowing for cost of attendance payments would be a substantially less restrictive alternative). The circuit court otherwise agreed with the NCAA that restraints on cash payments for name, image, and likeness rights were appropriately tethered to the NCAA's procompetitive justifications. The NCAA was not railroaded by a rogue district court. The NCAA presented its evidence, its arguments were adopted in part by both the district court and, to a greater extent, the circuit court, and it succeeded in preserving a large part of its restraint of trade.

In seeking *certiorari* in the *O'Bannon* case, the NCAA claimed that the modest injunction entered by the district court and upheld by the circuit court would fundamentally alter the landscape of college sports and jeopardize the sacred tradition of

"amateurism." This Court declined review in 2016, and in the intervening time, the NCAA has fully reversed course on its opposition to allowing college athletes to share in name, image, and likeness revenues; in fact, in April 2020, the NCAA Board of Governors approved a plan to allow for college athletes to receive endorsements and other marketing opportunities, rights far beyond those granted in *O'Bannon*.[8] Some schools are even creating programs to assist college athletes in marketing their name, image, and likeness rights, using those opportunities as a recruitment tool.[9] Thus, the very restraint that the NCAA claimed was necessary to preserve amateurism in *O'Bannon*—ensuring that college athletes received $0 for their name, image, and likeness rights—has now been jettisoned just a few short years later, demonstrating *exactly* how unnecessary it was for the product to exist. This Court must ask itself how it can be possible that a restraint that was *absolutely necessary* for the product of college sports to exist at all in 2016 could become *completely unnecessary* for the product to exist by early 2020, and more broadly, why the entity that made that outlandish claim should now be rewarded with immunity from the antitrust laws.

Four years later, over the course of the ten-day trial in *Alston*, the trial court again reviewed an

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[8] NCAA, *Questions and Answers on Name, Image and Likeness* (Jan. 2021), https://www.ncaa.org/questions-and-answers-name-image-and-likeness (last visited Mar. 8, 2021).

[9] Sam McKewon, *Nebraska Partners with Opendorse to Create the 'first-ever' Name, Image and Likeness Program*, OMAHA WORLD-HERALD (Mar. 10, 2020), https://omaha.com/sports/college/huskers/teams/nebraska-partners-with-opendorse-to-create-the-first-ever-name-image-and-likeness-program/article_d4034f73-bde5-50b7-9cc9-02f25955914b.html.

extensive record, with evidence and testimony offered by student athletes, NCAA lay witnesses, and economists for both sides. The district court again weighed all of the evidence and issued a lengthy, hundred plus page, well-reasoned opinion based on the record in front of her. The district court found that, while the challenged restraints (that differed from those in *O'Bannon*) had some limited procompetitive benefits, the plaintiffs had demonstrated a substantially less restrictive alternative that would achieve the same procompetitive benefits, with virtually the same effectiveness as the NCAA's overly restrictive limits on compensation. The court's balanced decision was, again, grounded in testimony from the NCAA's own witnesses. Pet. App. at 156a. And the circuit court again affirmed.

Following the fact intensive traditional rule of reason analysis, the NCAA has largely been successful in maintaining its system of "amateurism." The decision in *Alston* simply authorizes additional, modest education-related benefits while allowing the NCAA to continue ensuring that college athletes do not become professional, paid athletes. The fact-intensive, balancing analysis employed by the district court worked exactly as it should have.

The NCAA has not come to this Court to argue that the evidence is wrong. It does not dispute a single factual finding made by the *Alston* court. Instead, having lost on the facts and on the law, the NCAA is pounding the table. It asks this Court to disrupt a century of settled precedent on the rule of reason and decades of its application to joint ventures. The NCAA seeks to rewrite the rule of reason analysis to accommodate its own inability to fashion rules for intercollegiate athletics that do not violate this

country's antitrust laws. What the NCAA seeks is blanket antitrust immunity for its conduct—and apparently the conduct of any entity calling itself a joint venture—based solely on an assertion (in this case disproven) that the product it provides can exist only under the specific restraints it deems necessary. NCAA Br. at 29. The results in both *O'Bannon* and *Alston* provide a real-world demonstration that the rule of reason is alive, well, and functioning exactly as it should. And as the governing body of collegiate athletic competitions, the irony of seeking to change longstanding rules of play not because they are unfair, but simply because it cannot win on the field, should not be lost on the NCAA.

In both *O'Bannon* and *Alston*, the trial court had access to a fully developed factual record, with the benefit of expert analysis from economists on both sides. In both cases, upon examination of the restraints and their competitive effects, the trial court appropriately found that the NCAA's rules on compensation were more restrictive than necessary to maintain amateurism in college sports, siding in some instances with the plaintiffs, and in some instances with the NCAA. The circuit court, twice, did the same. But if the NCAA was granted deference or immunity at the beginning of the litigation, as the NCAA seeks, the lower courts would not have had the opportunity to look at the anticompetitive nature of the restraints, analyze the factual record, and actually find that the restraints were anticompetitive. Having done that analysis, in two separate instances, it is now clear that the NCAA's rules on compensation are, in fact, anticompetitive on balance. This shows that the NCAA's proposed limited mode of analysis is antithetical to the fundamental purpose of this country's antitrust laws. As the circuit court correctly

noted, "[t]he NCAA is not above the antitrust laws, and courts cannot and must not shy away from requiring the NCAA to play by the Sherman Act's rules." *O'Bannon*, 802 F.3d at 1079. The NCAA's inability or unwillingness to craft rules that comply with the Sherman Act is no basis for overturning decades of precedent.

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